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Nos. 88-6651, 88-1182

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

MAURICE M.,
Petitioner,

vs.

JACQUELINE BOUKNIGHT,
Respondent.

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

vs.

JACQUELINE BOUKNIGHT,
Respondent.

On Writ of Certiorari
To the Court of Appeals of Maryland

BRIEF OF AMICUS CURIAE CHARLES M. IN SUPPORT OF PETITIONERS MAURICE M. AND THE BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST AMICUS CURIAE	1
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. WHEN THERE IS NO LESS RESTRICTIVE ALTERNATIVE FOR PROTECTING THE CHILD, THE STATE'S COMPELLING INTEREST IN THE PROTECTION OF CHILDREN WITHIN THE JURISDICTION OF THE JUVENILE COURT MAY TAKE PRECEDENCE OVER THE CONFLICTING FIFTH AMENDMENT RIGHTS OF A PARENT WHICH ARISE IN JUVENILE COURT CHILD PROTECTIVE PROCEEDINGS.	10
A. THE STATE'S INTEREST IN THE PROTECTION OF ABUSED AND NEGLECTED CHILDREN IS A COMPELLING AND URGENT ONE.	14
B. THE STATE'S COMPELLING INTEREST IN THE PROTECTION OF CHILDREN WITHIN THE JURISDICTION OF THE JUVENILE COURT MAY TAKE PRECEDENCE OVER THE CONFLICTING FIFTH AMENDMENT RIGHTS OF A PARENT WHICH ARISE IN JUVENILE COURT CHILD PROTECTIVE PROCEEDINGS.	23
CONCLUSION	53

TABLE OF AUTHORITIES

CASES	Page
Breed v. Jones, 421 U.S. 519 (1975)	2
California v. Byers, 402 U.S. 424 (1971)	37,38,39
Cantwell v. Connecticut, 310 U.S. 296 (1940)	36
Coy v. Iowa, ___ U.S. ___, 108 S.Ct. 2798 (1988)	34,35
Doe v. Staples, 706 F.2d 985 (6th Cir. 1983)	48
In the Matter of the Welfare of J.W., 391 N.W.2d 791 (Minn. 1986)	50
In the Matter of the Welfare of J.W., 415 N.W.2d 879 (Minn. 1987)	50
In re Jessica B., 254 Cal.Rptr. 883 (Ct. App. 5th 1989)	50
Jehovah's Witnesses v. King County Hospital, 278 F.Supp. 488 (W.D. Wash. 1967) aff'd mem., 390 U.S. 598 reh. denied 391 U.S. 961 (1967)	12,28
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	2,11,24

Malloy v. Hogan, 378 U.S. 1 (1964)	36
Minor v. Bureau of Social Services, 107 S.Ct. 899 (1987)	50
New York v. Quarles, 467 U.S. 649 (1984)	45
Palmore v. Sidotti, 466 U.S. 429 (1984)	11
Parham v. J.R., 442 U.S. 584 (1979)	2
Pennsylvania v. Ritchie, ___ U.S. ___, 107 S.Ct. 989 (1987)	10,19,24, 32,33
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	11,12
Port v. Heard, 764 F.2d 423 (5th Cir. 1985)	43
Prince v. Massachusetts, 321 U.S. 158 (1944)	10,12,24, 25,26,27, 39
In re Ryan M., 513 A.2d 837 (Me. 1986)	50
In re S.A.V., 392 N.W.2d 260 (Minn. App. 1986)	50
Santosky v. Kramer, 455 U.S. 745 (1982)	11,12,24
Thomas v. Review Board of the Indiana Employment Security	

Division, 450 U.S. 707 (1981) 43

Walker v. Superior Court, 253 Cal.Rptr. 1 (1988) 43

Wisconsin v. Yoder, 406 U.S. 205 (1972) 11,12,25 29,30,31 35

Wyman v. James, 400 U.S. 309 (1971) 10

CONSTITUTIONS

United States Constitution

First Amendment 26,27,30 36,37

Fifth Amendment 4,6,7, 8,9,10, 13,23,36, 37,45,49, 50,51,53

Sixth Amendment 7,24,32, 34,39

Fourteenth Amendment 13,24,26, 30,32,36

STATUTES AND CODES

42 U.S.C. §671(a) 48

Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. §5101 et seq. 17

Maryland Courts and Judicial Procedings Code Ann.
§3-801(e) 41
§3-814(c) 47

Public Law 100-294, §106 18

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National Conference of State Legislatures, **Legislative**

Summaries on Children, Youth, and Family Issues, 1983-1987 (1988) 20

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Nos. 88-6651, 88-1182

In The

Supreme Court of the United States

October Term, 1988

Maurice M.,

Petitioner,

v.

Jacqueline Bouknight,

Respondent.

Baltimore City Department of Social Services,

Petitioner,

v.

Jacqueline Bouknight,

Respondent.

Brief of Amicus Curiae

INTEREST OF AMICUS CURIAE

Amicus Charles M. files this amicus curiae brief in support of Petitioners

Maurice M. and the Baltimore City Department of Social Services. Charles is a ten-year-old boy who was physically abused by his parent. As a result of that abuse suffered at the hands of his parent, Charles was placed under the jurisdiction of the San Francisco Juvenile Court. He remains a ward of that Court and is subject to its continuing jurisdiction.

Since 1970 the National Center for Youth Law has represented the interests of children in several landmark cases decided by the United States Supreme court such as Breed v. Jones, 421 U.S. 519 (1975); Parham v. J.R., 442 U.S. 584 (1979); and Lassiter v. Department of Social Services, 452 U.S. 18 (1981). During the past two decades, NCYL staff have developed experience in an extensive range of issues affecting the legal rights of children. NCYL is part of the national system of legal services for the poor. It provides consultation to and

serves as a resource center for private attorneys, legal services offices, public interest attorneys, and other advocates for children throughout the country who work on issues related to child welfare, juvenile justice, public benefits for children, child and adolescent health, homeless children, and housing discrimination against families with children.

QUESTIONS PRESENTED

I. DOES A COURT ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED INFANT SON COMPEL INCRIMINATING TESTIMONY IN VIOLATION OF THE PARENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION?*

II. EVEN IF THE FIFTH AMENDMENT PRIVILEGE IS IMPLICATED BY A COURT ORDER TO PRODUCE A CHILD, IS THE PRIVILEGE OVERCOME BY THE IMPORTANT SOCIETAL INTEREST IN PROTECTING CHILDREN IN JEOPARDY OF SERIOUS INJURY?

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* Amicus addresses only the second question certified for consideration by the Court. In so doing, amicus expresses no opinion with regard to the merits of the first question.

STATEMENT OF THE CASE

Amicus adopts and incorporates by reference here the Statement of the Case contained in the brief of Petitioner, Maurice M.

SUMMARY OF ARGUMENT

When no less intrusive alternative for protection of the child exists, the state's interest in the safety of an abused child who is a ward of the juvenile court may be of sufficient importance to compel the parent to produce the child over her objection that to do so violates her Fifth Amendment rights to be free from self incrimination.

Preservation of the health and welfare of children is an urgent and compelling interest of the state. The state has an even stronger interest in protecting children whose previous abuse by the parent has been confirmed and the child placed under the jurisdiction of the juvenile court. In a series of decisions of this Court, a balancing process has been applied in resolving conflicts which arise between the constitutional rights of a parent and the

state's interest in child protection. These cases when read in conjunction with subsequent decisions approving or suggesting that some infringement upon a defendant's Sixth Amendment right is permissible in order to advance the state's goal of protecting abused children. Taken together, those decisions form the basis for applying a similar balancing test when the conflict arises between Fifth Amendment rights of the parent and the state's interest in protecting children within the jurisdiction of the juvenile court from harm by that parent.

In resolving whether or not the state's interest is sufficient to override the Fifth Amendment rights of the parent, the court must weigh the particular facts and circumstances of the case, including the availability of less intrusive alternatives adequate to protect the child suspected of being in danger. The circumstances of this

case argue most compellingly for the balance of interests being struck in favor of the state and the child. Previous abuse of the child, the seriousness and multiplicity of past injuries, his very young age, the mother's prior admissions regarding her inadequate care of the child, her submission to the continuing jurisdiction of the court, uncontroverted evidence of her mental health and its adverse impact on her ability to protect the child, and her intentional misleading of the court in its search for her infant son all suggest that the child whom the court seeks to be produced is in a real and present danger. In the absence of a less intrusive means of achieving the state's compelling goal here, the abrogation of any Fifth Amendment right the mother may have is warranted.

While the circumstances of this case warrant the abridgment of the mother's constitutional right, amicus urges the Court

to narrow explicitly the application of this result. Outside of compelling a parent to bring a child to court or to disclose his whereabouts, there are other circumstances in dependency and abuse cases which implicate the Fifth Amendment rights of parents. Should the Court hold that the state's interest is sufficiently compelling to override that constitutional right here, such a holding should be confined to the particular facts of this case.

ARGUMENT

I. WHEN THERE IS NO LESS RESTRICTIVE ALTERNATIVE FOR PROTECTING THE CHILD, THE STATE'S COMPELLING INTEREST IN THE PROTECTION OF CHILDREN WITHIN THE JURISDICTION OF THE JUVENILE COURT MAY TAKE PRECEDENCE OVER THE CONFLICTING FIFTH AMENDMENT RIGHTS OF A PARENT WHICH ARISE IN JUVENILE COURT CHILD PROTECTIVE PROCEEDINGS.

The state's protection of the health and safety of children long has been recognized as a compelling state interest. Pennsylvania v. Ritchie ___ U.S. ___, 107 S.Ct. 989, 1003 (1987), Prince v. Massachusetts 321 U.S. 158 (1944). This Court has observed that "[t]here is no more worthy object of the public's concern" than the protection and welfare of children, Wyman v. James 400 U.S. 309, 318 (1971);

that the state has an "urgent interest" in their welfare, Lassiter v. Department of Social Services 452 U.S. 18, 27 (1981); and that "[t]he State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." Palmore v. Sidotti, 466 U.S. 429, 433 (1984).

The opinions of this Court also have repeatedly affirmed the fundamental nature of a parent's right to the care, custody and management of their children. Santosky v. Kramer, 455 U.S. 745 (1982); Wisconsin v. Yoder 406 U.S. 205 (1972); Pierce v. Society of Sisters 268 U.S. 510 (1925). It has been described as "an interest far more precious than any property right" Santosky, 455 U.S. at 758. Furthermore, "[t]he fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or

have lost temporary custody of their child to the State", Santosky 455 U.S. at 753.

Inevitably, these two interests have come into conflict. In the resolution of these conflicts, no rule of absolutes has prevailed. Instead, this Court has engaged in a balancing of interests. In that balancing sometimes the parents' interests have been found to outweigh those of the state, Pierce v. Society of Sisters 268 U.S. 510 (1925); Wisconsin v. Yoder 406 U.S. 208 (1972), while in other circumstances the parents' rights, though of constitutional stature, have been compelled to give way to those weightier interests of the state. Prince v. Massachusetts 321 U.S.158 (1944); Jehovah's Witnesses v. King County Hospital, 278 F.Supp. 488 (W.D. Wash. 1967) aff'd mem., 390 U.S. 598 reh. denied 391 U.S. 961 (1967). Although the results of this balancing of interests have differed, the viability of the balancing test itself has

been maintained. Even outside of the parent-child relationship, the Court has applied a balancing process when the interests of the state in child protection have come into conflict with the constitutional rights of a criminal defendant.

In the case before the Court, the Maryland Court of Appeals held that the application of a balancing test was not appropriate when the state's interest in protecting the victims of child abuse ran up against the Fifth Amendment right of the parent to be free from self-incrimination. This holding fails to acknowledge the weight properly afforded the particular state interest at issue here and ignores the precedents of this Court approving and applying a balancing of interests test. Even when the actions of the parent are predicated upon provisions of the Bill of Rights explicitly incorporated into the Due Process Clause of the Fourteenth Amendment

and thus made applicable to the states, a balancing process is appropriate.

A. THE STATE'S INTEREST IN THE PROTECTION OF ABUSED AND NEGLECTED CHILDREN IS A COMPELLING AND URGENT ONE.

In 1986 there were 2,086,000 documented reports of child abuse and neglect in the United States.[1] This figure represents an estimated 212 percent increase over the number of reports received in 1976.[2] Between forty and forty-two percent of the reports received in 1986 were substantiated after official

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[1] American Humane Association, **Highlights of Official Child Neglect and Abuse Reporting 1986**, at 6, 1988. This is the latest year for which national statistics are available.

[2] American Humane Association, **Responding to Child Neglect and Abuse**, at 2, 1988.

investigations.[3]

For that same year, twenty states, representing fifty percent of the nations's child population, reported 556 children died as the result of child abuse or neglect.[4] This figure is undoubtedly an underestimate of the actual number of fatalities since it includes only those children known to child protective services agencies before their death. In 76.4% of these deaths, the perpetrator was a parent, stepparent, or foster parent. Fifty-three percent of the victims were male while 46.3% were female.[5] From 1985 to 1986 national reports of child fatalities rose twenty-three percent, double the rate of increase the previous year.[6]

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[3] American Humane Association, Highlights, supra at 11.

[4] Id., at 24.

[5] Id., at 24, Table IX.

[6] American Humane Association, **Protecting Children** 17 (Summer 1988).

These official statistics represent only the tip of the iceberg of the problem. They include only those cases in which the child came to public attention through an official report of child abuse or neglect turned in to a state or local child protection agency.[7] Studies have shown that only one third of actual child abuse cases known to professionals get officially reported.[8]

Many of these child victims are, like petitioner Maurice, children who are too young to speak up for themselves; they are unable to flee the dangerous environment in which they live without the intervention of others. Nationwide, approximately forty-three percent of abused children are between

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[7] R. Gelles and M. Strauss, **Intimate Violence: The Definitive Study of the Causes and Consequences of Abuse in the American Family,** pp.72-74 1988.

[8] American Humane Association, **Responding to Child Neglect and Abuse**, at 2, 1988.

birth and five years old.[9] It is these young victims for whom the risk is greatest. The average age of the children who were reported as dying from injuries as the result of abuse or neglect in 1986 was 2.8 years.[10]

With passage of the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. 5101 et seq., Congress created the first of several federal programs specifically designed to combat child abuse and neglect. In more recently providing for the establishment of a National Commission on Child and Youth Deaths, Congress found that:

> (1) even by conservative estimates, during 1985 and 1986, child abuse fatalities in this country increased by 23 percent;
> (2) the average age of children

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[9] American Humane Association, **Highlights,** supra., p. 21, Table V.

[10] Id. at 24. Maurice, who is the subject of this case, is just about this age.

who die from abuse and neglect is two years old..

Pub. L. 100-294 Section 106. In 1984, Congress authorized Federal challenge grants to encourage states to establish and maintain trust funds for the support of child abuse and neglect prevention. Among the findings cited in support of this legislation were:

> (1) disturbing increases have occurred in recent years in the number of young Americans who are abused;
> (2) Many children who run away from home, who fall prey to pornography and prostitution, who suffer from a dependency on alcohol and drugs, and who become juvenile offenders, have been victims of child abuse;
> (3)research has shown that abuse tends to repeat itself, and many times parents who abuse their children were once victims themselves; ...
> (7) The Nation cannot afford to ignore the importance of preventing child abuse.

The importance of the public interest at issue in this particular case is also evidenced by the numerous state statutes

enacted for the benefit of children at risk of abuse and neglect.[11] Pennsylvania v. Ritchie ___ U.S. ___, 107 S.Ct. 989, 1003 n.17 (1987). Juvenile or family court acts establishing procedures for the protection of these children exist in all states and the District of Columbia. Comprehensive legislation mandating the reporting of child abuse has been in force in all states since 1968. Each year numerous revisions in both the civil and criminal laws addressing the problem are introduced in an attempt to increase child protection. From 1983 through the 1987 sessions of state legislatures, the number of bills concerning child abuse and neglect enacted increased 334 percent, from

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[11] See National Center on Child Abuse and Neglect, **State Statutes Related to Child Abuse and Neglect: 1986 and State Statutes Related to Child Abuse and Neglect: 1987 Update** (1988).

64 bills in 1983 to 278 in 1987.[12] These bills, among other things, have modified the definition of maltreatment which warrant state intervention, changed procedures in the juvenile and family courts, expanded the list of mandatory reporters, and provided for the protection of child witnesses.[13]

The urgency and importance of the child abuse problem is also reflected by the activities of the judiciary. Each year more than 3000 juvenile and family courts including more than 7000 judges and referees, hear 390,000 child abuse and neglect cases and review some 600,000 protective service orders like that which

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[12] National Conference of State Legislatures, **Legislative Summaries on Children, Youth, and Family Issues**, 1983-1987 (1988).

[13] National Conference of State Legislatures, **1987 State Legislative Summary: Children Youth and Family Issues** (1987).

was entered in petitioner's case.[14] These judges who daily see the results of neglect and abuse and who appreciate the urgency of the crisis have brought their collective experience together to develop recommendations for improving the welfare of children. During 1985 and 1986 a committee of presiding juvenile and family court judges from the 40 largest urban courts in the country met to discuss "the youth who now comprise the largest and fastest growing portion of most juvenile and family court caseloads"--i.e. abused and neglected children.[15] They emphasized the important societal interest in these children as "[c]hildren who are deprived of their

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[14] National Council of Juvenile and Family Court Judges, **Judicial Authority and Responsibility: 18 Recommendations on Issues in Delinquency and Abuse/Neglect Dispositions 1 (January, 1989).**

[15] Metropolitan Judges Committee, National Council of Juvenile and Family Court Judges, **Deprived Children: A Judicial Response** (1986).

essential needs not only are handicapped in their pursuit of happiness, they are a prime source of future crime and delinquency, and of future abuse of their own children."[16]

In introducing his Child Abuse Prevention Initiative this year Pennsylvania Governor Casey declared: "We feed our children, we put clothes on their bodies, but first and foremost we must make them safe from violence and neglect."[17] Governor Casey's statement is just one indication of the executive branch's appreciation for the urgency of the child abuse problem in our society. Its importance to the state is also reflected in other actions by executive branch members. For example, in 1986, the Attorney General of California sponsored a bill calling for the establishment of a Child Victim Witness Judicial Advisory

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[16] Id. at 5.

[17] State of the Commonwealth Address, January 24, 1989.

Committee. In 1987, the Governor of Alabama appointed a Special Commission of Child Welfare Services to study the crisis surrounding children at risk of abuse and neglect in the state.

Official statistics suggest the magnitude of the child abuse and neglect problem confronting the states. The responses to the problem by the states and Congress, confirm the importance of child protection as a legitimate, compelling interest of the state.

B. THE STATE'S COMPELLING INTEREST IN THE PROTECTION OF CHILDREN WITHIN THE JURISDICTION OF THE JUVENILE COURT MAY TAKE PRECEDENCE OVER THE CONFLICTING FIFTH AMENDMENT RIGHTS OF A PARENT WHICH ARISE IN JUVENILE COURT CHILD PROTECTIVE PROCEEDINGS.

This case presents "another episode in

the conflict" between the constitutional rights of a parent and the authority of the state, Prince v. Massachusetts, 321 U.S. at 159. In recent years this Court has addressed the constitutional conflicts which arise in both civil and criminal proceedings involving the interests of the state in child protection. In addition to defining the parameters of a parent's Fourteenth Amendment due process rights in involuntary termination of parental rights, Lassiter v. Department of Social Services 452 U.S. 18 (1981); Santosky v. Kramer 455 U.S. 745 (1982), the Court, in a recent case, has considered the state's interest in child protection sufficiently compelling to warrant infringement upon the Sixth Amendment rights of a criminal defendant Pennsylvania v. Ritchie ___U.S.___, 107 S.Ct. 989 (1987). In earlier decisions this Court has considered the conflicts which arose between parents' religious

freedoms and the state's interest in child welfare. Prince v. Massachusetts 321 U.S. 158 (1944); Wisconsin v. Yoder 406 U.S. 205 (1972). It is largely to this group of decisions that amicus draws the Court's attention for they provide the still viable framework for resolving the conflict now before the Court. While the Court has not been confronted with a balancing of state and parents' interests involving the precise constitutional provision which forms the basis for this suit, these cases form a precedent for overriding the constitutional right of a parent in the interest of child protection. Indeed, these cases legitimize use of a balancing process in this case and suggest how that balance should be struck.

The argument of a parent that the interests of the state in child welfare must give way to the constitutional rights of a parent when the right involved emanates from some specific provision of the Bill of

Rights made applicable to the states through the Fourteenth Amendment is not unprecedented. This court has confronted the argument in several cases in which the parents sought to justify their actions on the basis of First Amendment rights.

In Prince v. Massachusetts, 321 U.S. 158 (1944) the child's custodian was convicted under provisions of the state child labor laws which prohibited parents or custodians from compelling or permitting children of certain ages to sell newspapers or participate in the exercise of any other trade on the street or public place. The custodian's challenge to the statute "rest[ed] squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental rights as secured by the due process clause of the latter Amendment" Prince, 321 U.S. at 164. Justice Reynolds

acknowledged the "sacred private interests basic in a democracy" which were implicated by the state's prohibiting a child from joining a parent in the distribution of a religious magazine. Prince, 321 U.S. at 165. Balanced against that individual right was the state's interest which was described as "no mere corporate concern of official authority. It is the interest of youth itself and of the whole community that children be both safeguarded from abuses and given opportunity for growth into free and independent well-developed men and citizens" Prince, 321 U.S. at 165. In sustaining the custodian's prosecution and conviction against her claims of First Amendment violations the Court concluded "that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes to some extent, matters of conscience and religious conviction" Prince,

321 U.S. at 167.

This Court considered the First Amendment - state child protection interest conflict again in Jehovah's Witnesses v. King County Hospital 278 F. Supp. 488 (W.D. Wash. 1967) aff'd mem., 390 U.S. 598, reh. den. 391 U.S. 961 (1967). The parents in that case were Jehovah's Witnesses; they challenged the power of the juvenile court to order that their children be given blood transfusions contrary to the expressed beliefs and direction of the parents. The three judge court convened to review the state statute under which the juvenile court derived its power to order the transfusions had concluded that Prince "does lay down the foundation, binding upon us for the particular state intervention in the name of the health and welfare which is here under review" Jehovah's Witnesses 278 F. Supp. at 504. In a per curiam opinion citing only Prince, the Court approved the juvenile

court's exercise of its parens patriae power to protect the health of children.

This tension between the exercise of First Amendment rights by the parent and a state's interest in the welfare of children was again considered in Wisconsin v. Yoder 406 U.S. 208 (1972). At issue in Yoder was the conflict between the state's interest in universal education and the fundamental religious freedom of the parents. The parents of teenage children had refused to send them to school beyond the eighth grade as a result of which they were convicted of violating the state's compulsory school attendance law. As members of the Old Order Amish religion, they insisted that their children's attendance at high school was contrary to their religion. This Court granted certiorari to review the decision of the Wisconsin Supreme Court which had reversed the parents' convictions on grounds that it violated the Free Exercise Clause of

the First Amendment made applicable to the states under the Fourteenth Amendment.

Although this Court affirmed the reversal of the convictions, it acknowledged the continued viability of a "balancing process" when an important state interest "impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment. Yoder, 406 U.S. at 214. While the particular state interest sought to be advanced in Yoder was not "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause", Yoder, 406 U.S. at 214, the legitimacy of the balancing test itself was not undermined by the Court's decision. While it is difficult to meet the burden for subordinating First Amendment claims of the parent, the Court acknowledges that there are "those interests of the highest order [that] can overbalance legitimate claims to

the free exercise of religion" Yoder 406 U.S. at 215. The failure to find that the public interest in compulsory education of children beyond the eighth grade was not sufficiently weighty does not undercut the Court's previous ruling that there are such interests of the state which are sufficient to override this constitutional right. In fact in the latter part of the Court's opinion, there is a clear suggestion that the type of urgent interest as is presented in this case would compel a different resolution of the balancing test. In distinguishing Yoder from the decision in Prince v. Massachusetts, Chief Justice Burger notes: "This case, of course, is not one in which any harm to the physical or mental health of the child or to public safety, peace, order or welfare has been demonstrated or may be properly inferred." Yoder, 406 U.S. at 230.

Added to this group of cases is the

recent decision of the Court in Pennsylvania v. Ritchie ___U.S. ___, 107 S.Ct. 989 (1987), in which infringement upon a defendant's Sixth Amendment rights was found to be permissible in order to promote the state's interest in child abuse prevention. In Ritchie, the Court considered whether and to what extent a state's interest in the confidentiality of its child abuse investigation files must yield to a criminal defendant's Sixth and Fourteenth Amendments right to discover favorable evidence. In holding that depriving the defendant of the right of his counsel to review the file for exculpatory information was justified, the Court concluded that :

> To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information. If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child

> abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state designated person to whom he may turn and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected.

Ritchie, 107 S.Ct. at 1003. In Ritchie it was not the protection of the file itself which was the primary interest. Rather, protecting the file from full disclosure to defense counsel was important in advancing the state's interest in uncovering and treating child abuse. Insulating the report from defendants would foster the compelling interest the state has in the reporting of abuse and the encouragement of victims to seek counselling. Limiting the defendants constitutional right under these

circumstances was warranted.

Last term in Coy v. Iowa ___U.S. ___, 108 S.Ct. 2798 (1988), the Court emphasized the importance of considering individualized findings with respect to a particular child before a decision on overriding a defendant's Sixth Amendment right to confrontation could be made. The state had argued that a general legislative finding that victims of child sexual abuse needed special protection in the courtroom was sufficient to subordinate a criminal defendant's rights to confront his accusers. This generalized finding and the presumption of trauma upon which it was based was held to be an insufficient basis for permitting an exception to the rights embodied in the Confrontation Clause. In the absence of individualized findings that these particular witnesses needed special protection, the Court was unwilling to countenance any infringement upon the

defendant's rights Coy, 108 S.Ct. at 2805. Justices O'Connor and White in their concurring opinion would in "an appropriate case" involving child witnesses permit some diminution of defendant's rights. Coy, 108 S.Ct. at 2803. If case specific findings of necessity were made they concluded "our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses" Coy 108 S.Ct. at 2805.

These cases make it clear that the prevention of injury to a child is of paramount interest to the state. That interest has been balanced against constitutional rights which "have been zealously protected sometimes even at the expense of other interests of admittedly high social importance" Yoder, 406 U.S. at 214. But even though the individual rights involved are of constitutional magnitude, when the health and safety of a child are

endangered, the balance of rights and interests may tip decidedly in favor of the child's welfare.

Both the First Amendment and the provisions of the Fifth Amendment at issue here have been made applicable to the states by virtue of the Fourteenth Amendment. Cantwell v. Connecticut 310 U.S. 296 (1940) (First Amendment), Malloy v. Hogan 378 U.S. 1 (1964) (Fifth Amendment). However, no hierarchy of individual rights has been established which would place the Fifth Amendment rights of the parent above their First Amendment rights. There is no basis for concluding that one of the individual rights involved here is superior to another in our constitutional scheme. If those First Amendment rights of the parent may be overcome by societal interest in the protection of a child, then amicus submits that other individual rights may be subjected to a similar carefully

circumscribed balancing of interests. Consequently, if the interests of the state in child protection may, under some circumstances justify interference with a parent's First Amendment rights, then under appropriate circumstances a similarly narrow abridgment of Fifth Amendment rights may occur.

Such a balancing of competing interests is not unprecedented when Fifth Amendment rights are implicated. In California v. Byers 402 U.S. 424 (1971), this Court upheld a statute requiring drivers who were involved in an auto accident resulting in property damage to stop and provide their name and address to the owner of the damaged property. Chief Justice Burger observed "[t]he tension between a State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the

public need on the one hand, and individual claim of consitutional protections on the other", Byers, 402 U.S. at 427.

Justice Harlan, concurring in the Court's decision, described the Court's task as one of accommodation :

> [a]s uncertain as the constitutional mandate deprived from this portion of the Bill of Rights may be, it is the task of this Court continuing to seek that line of accommodation which will render this provision relevant to contemporary conditions.

Byers 402 U.S. at 454. In approving the state's compulsion that the driver in Byers provide the information sought, Justice Harlan considered several factors significant:

> ... the state has confined the portion of the scheme now before us ... to the minimal level of disclosure of information consistent with the use of compelled self reporting.. The Court must take cognizance of the level of detail required in the reporting programs as well as the circumstances giving rise to the duty to report...

Byers 402 U.S. at 456.

When the teachings of the Prince line of cases, the more recent decisions of the Court on Sixth Amendment conflicts with state child protection interests, and Byers are considered, the decision of the juvenile court in this instance should be affirmed. Under the court's order in this case the mother is being compelled to do only that which is essential to the court's fulfilling its obligation to ensure Maurice's protection. When the circumstances of the case are considered there is ample evidence of the need for the Court to see Maurice. Finally, there is no less intrusive alternative available to the court.

Little is known about what happened to Maurice since he returned to his mother's care almost two years ago. However, the record does contain crucial information about the mother's earlier treatment of him from which the court could and did infer

that he was currently in danger. At the time of the state's first intercession on Maurice's behalf, he was only four months old. J.A. 8 During the first few months of his life he had suffered four fractures, each in a different part of the body. J.A. 11, 13, 15 The physician who saw him at the time concluded that the injuries - to his arm, shoulder blade, shoulder socket and thigh - were very likely the result of child abuse. J.A. 12 With such a history the physician who had seen Maurice was concerned that the next injury might be fatal. J.A. 12

Furthermore, in the juvenile court, Ms. Bouknight agreed that Maurice was a Child In Need of Assistance, thus implicitly admitting that he had not received proper care and attention and that she was unable

or unwilling to do so.[18] J.A. 20 In her admission to the Court she had specifically conceded, among other things, that she had shaken and thrown Maurice when he was in the hospital for treatment of injuries considered to be the result of abuse, as well as the fact she suffered from emotional problems. J.A. 20

When the juvenile court made the decision to order Ms. Bouknight to produce Maurice it also had independent information about her mental health. In that psychodiagnostic evaluation, conducted only a month before Maurice was last seen, the psychologist expressed his unequivocal opinion that Ms. Bouknight was unable to care for and protect Maurice. J.A. 25

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[18] A Child in Need of Assistance is defined, in part, as a child who does not receive ordinary and proper care and attention and whose parents, guardian(s) or custodian(s) are unable or unwilling to give proper care and attention to the child and his problems. Md. Cts. and Jud. Pr. Code Ann. §3-801(e).

The court's order to produce Maurice also came after Ms. Bouknight agreed to be bound by the court's continuing jurisdiction over her and Maurice; she agreed to a number of conditions as a part of the court's order and the agency's agreement to return Maurice to her. App. Pet. Cert. 85a-87a Finally, she has not remained silent about Maurice's whereabouts. She purposefully misled the juvenile court when she told the judge that Maurice was with an aunt in Texas. J.A. 65-66

When these factors - the very young age of the child involved, a past history of abusive behavior toward the child, confirmed serious multiple injuries inflicted at different times, an unchallenged mental health assessment warning against custody being placed with the mother, her admission of abusive acts toward Maurice, her acceptance of the continuing jurisdiction of the court under an order of protective

supervision, and her deliberate misleading of the court and others in their attempts to locate the child - are all taken together amicus submits that the state's interest in the protection of this particular child is sufficiently high to compel the mother to produce Maurice.

Although the state may demonstrate a compelling interest sufficient to override individual constitutional rights, the infringement upon that right must be the least restrictive alternative necessary to achieve the state's goal. Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 718 (1981), Port v. Heard 764 F.2d 423, 432 (5th Cir. 1985), See also Walker v. Superior Court 253 Cal Rptr. 1 (1988).

Maurice's mother knows where he is. She has not suggested that it is impossible for her to comply with the court's directive. No other alternative to determining his

whereabouts has been suggested by her nor is there any other apparent way of finding him. Both the resources of the police and the child protective agency have been used yet in more than a year's time they have still been inadequate. Maurice's mother is the sole source of the information which would bring Maurice to the jurisdiction of the court. She is not being asked to tell the court how Maurice got to where he is nor when he was placed there. Her role in his placement there is not the subject of the court's order. No questions are asked about her treatment of him since he was returned home nor is she questioned about others to whom she might have entrusted him. Given the gravity of the governmental interest at stake here, the minimal action which is called for on the part of the mother, and the specific evidence available to the court warranting an inference of danger to this particular child, overriding the mother's

Fifth Amendment right is justified and is the least intrusive alternative available. The social costs which result from adherence to the mother's position here are too great to be tolerated. New York v. Quarles 467 U.S. 649, 657 (1984).

The implications for the hundreds of thousands of children under protective supervision of the juvenile courts of adhering to the rule which Ms. Bouknight suggests are staggering. Fundamental to these courts' exercise of their parens patriae power is the ability to command the presence of the child. If parents are able to obstruct the court in this basic way then the court is rendered powerless, the parens patriae power is not simply diminished it is nullified for those children. The importance of the court's contempt power in such situations should not be lightly dismissed.

Recently, the National Council of Juvenile and Family Court Judges conducted a

survey of juvenile and family court judges from all over the United States. The judges were asked a series of questions about their authority and responsibility. Responses from judges in 42 states were received. The results of the survey suggest considerable judicial concern over the necessity for obtaining sufficient authority to exercise their judicial functions in child abuse and neglect cases. Authority to order sanctions/treatment for parents was ranked as the second greatest problem facing the juvenile courts among the judges surveyed. A majority of the judges (58%) cited their contempt powers as their most usual source of authority over parents abusing or neglecting their children. They have recommended that :

> Legislation should define contempt powers in relation to an enumerated series of circumstances which have resulted in noncompliance. There should be specific recitation within the juvenile and children's statutes

> with regard to the court's authority to enforce its treatment, service, and other restraining or protective orders applicable to the child, parents or guardian of the child, or the legal custodian or agency providing treatment or service"[19]

In the present case, the juvenile court had been given explicit statutory authority to order the child brought before the court and to utilize its contempt powers should the parent fail to cooperate. Md. Cts and Jud. Pr. Code Ann. §3-814 (c). Rather than diminish the existing contempt powers of the juvenile and family courts, judges from around the country have confirmed the importance of reaffirming and establishing explicit contempt powers if they are to fulfill their charge to protect the abused and neglected children under their jurisdiction.

Upholding the mother's refusal to

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[19] NCJFCJ, **Judicial Authority**, supra at 18.

produce Maurice also has serious implications for child welfare practice. By virtue of federal law[20], child welfare agencies like the BCDSS are mandated to provide reasonable efforts to reunite families whose children have been removed from the home as a result of abuse or neglect. In Maurice's case reunification occurred after the agency had some assurances that those efforts had made it reasonably safe to return him home to the mother. J.A. 29-32 Yet this return was a conditional one. J.A. 27-28 Doe v. Staples 706 F.2d 985 (6th Cir. 1983). Protective supervision was ordered and the court's jurisdiction was continued. If further protection of Maurice was necessary, the agency reasonably believed it could apply to the juvenile court and that that court had the authority to take additional action to

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[20] 42 U.S.C. §671(a).

protect Maurice. If the court is denied the authority to compel a parent to produce a child who has previously been adjudicated neglected or abused and is already a ward of the court, agencies will be reluctant to return children home and the courts equally unwilling to approve such a plan. Parents' attempts to regain custody of their children from foster care will be made more difficult. A more difficult threshold will be established and a more demanding test applied before the court will agree to place the child back in the home if its power to protect the child, even in the most dangerous situations, is extinguished by the parents' assertion of a Fifth Amendment right. Children will remain separated from their families for longer periods of time until virtually all risk is believed to be gone. These additional considerations of public policy also should be weighed heavily in determining whether or not Ms. Bouknight

can be compelled to bring her son to Court.

This case does not present the only instance in which Fifth Amendment rights of the parent have been the subject of conflict in the juvenile court. The conflict has arisen at various stages of juvenile court proceedings. In re Ryan M. 513 A.2d 837 (Me. 1986); In re S.A.V. 392 N.W.2d 260 (Minn. App. 1986); In the Matter of the Welfare of J.W. 391 N.W.2d 791 (Minn.1986) cert. denied sub nom. Minor v. Bureau of Social Services 107 S.Ct. 899 (1987); In the Matter of the Welfare of J.W. 415 N.W.2d 879 (Minn. 1987); In re Jessica B., 254 Cal.Rptr. 883 (Ct. App. 5th 1989).

Although amicus argues that a parent's Fifth Amendment right, if any is involved in the order challenged here, may be overridden by the state's compelling interest in the health and safety of the child under appropriate circumstances, no general abrogation of Fifth Amendment rights in the

context of abuse and neglect cases - civil or criminal - is suggested nor does this case require that the Court consider such a more encompassing rule.

Child abuse complaints and proceedings may give rise to Fifth Amendment conflicts in a number of different ways. For example, many cases of child abuse brought to the court's attention involve allegations of substance abuse on the part of parents. While the court may be justified in refusing to return a child to a parent who refuses to participate in treatment for such abuse, the state's interest in the child should not be used as a sufficient basis for compelling the parent to cc fess the extent of their drug involvement. Mere allegations of child abuse unsupported by competent evidence nor confirmed by judicial findings certainly should not be grounds for overriding parental constitutional rights. Assertion of a generalized goal of child

protection should not be sufficient to extinguish individual rights. In fact, that is not the case here. Rather, the determination of what, if any, interference with constitutional rights is warranted must be done on a case by case basis and will require individualized findings.

CONCLUSION

Ms. Bouknight asks this Court to depart from its precedents in which the compelling importance of the state's interest in the health and safety of children has been recognized. Those decisions have approved a balancing test when conflicts arise between individual constitutional rights and the state's interest in child protection. When the individual facts of this particular case are considered as they must be in conducting such a balancing, the abridgment, if any, of the mother's Fifth Amendment rights is justified.

Respectfully submitted,

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